Nos. 52 and 53

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

N. E. ROSENBLUM TRUCK LINES, INC.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

J. B. MARGOLIES, AN INDIVIDUAL DOING BUSINESS AS MANHATTAN TRUCK LINES

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

INDEX

CITATIONS

Cases:

423296—41——1

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 52

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

N. E. ROSENBLUM TRUCK LINES, INC.

No. 53

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

J. B. MARGOLIES, AN INDIVIDUAL DOING BUSINESS AS MANHATTAN TRUCK LINES

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The single opinion of the specially constituted district court (R. 15–19) is reported in 36 F.

Supp. 467. The single report of the Interstate Commerce Commission (R. 5–10) is published in 24 M. C. C. 121.

JURISDICTION

The final decree of the district court in each of these two cases was entered January 20, 1941 (R. 22–23, 39). Petitions for appeal were filed March 13, 1941 and were allowed the same day (R. 25–26, 42). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208, 28 U. S. C., Secs. 47 and 47 (a)); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 28 U. S. C., Sec. 345); and by the Motor Carrier Act of 1935, Section 205 (h)[1] (49 Stat. 543, 49 U. S. C., Section 305 (h)).

QUESTION PRESENTED

Whether the truck operations in which appellees were separately engaged on July 1, 1935 were those of "contract carriers by motor vehicle" as defined by the Motor Carrier Act of 1935, entitling them to permits from the Interstate Commerce Commission to operate as such carriers under the "grandfather" proviso of Section 209 (a) of the Act.

---

[1] This statute was applicable on July 1, 1940, the date of the Commission's order. The Transportation Act of 1940, 54 Stat. 899, approved September 18, 1940, re-arranged this provision, without change, as Interstate Commerce Act, Part II, Section 205 (g).

STATUTES INVOLVED

The pertinent provisions of the Motor Carrier Act of 1935, applicable at the date of the Commission's order, July 1, 1940, are set forth in the Appendix, *infra*, pp. 29–32. Changes made in these provisions by the Transportation Act of 1940, approved September 18, 1940, are noted.

STATEMENT

These are direct appeals by the United States and the Interstate Commerce Commission from final decrees of a specially constituted district court, convened pursuant to the Urgent Deficiencies Act of 1913, which sustained appellees' separate petitions to annul, set aside and enjoin an order of the Interstate Commerce Commission entered July 1, 1940. The order (R. 204) denied appellees' separate applications under the "grandfather" proviso of Section 209 (a) of the Motor Carrier Act of 1935, for a permit authorizing operations as a contract carrier by motor vehicle.[2]

---

[2] Appellees' applications were separately heard by the Interstate Commerce Commission. However, throughout the proceedings resulting in these two appeals, it has been recognized by the parties, the Commission and the district court that the issues of fact and law presented in the two cases are identical. The Commission entered one order (R. 204) and issued one report (R. 5–10) jointly disposing of both applications. Appellants filed separate actions in the district court to annul and set aside this order (R. 1, 28) but a joint final hearing on the two petitions was held by the district court (R. 15). The court entered separate decrees,

The only portion of the evidence presented to the Commission on these applications which is pertinent here is that which described the nature of the operation in which appellees were engaged on and before July 1, 1935.[3] These evidentiary facts are not in substantial dispute. The evidence disclosed that it is a customary practice of common carriers by motor vehicle to augment their own road unit supply by engaging extra trucks under lease or other arrangement from time to time to handle overflow traffic (R. 98, 103). Often not only the trucks but the owner-drivers were engaged to supplement the carrier's own equipment (R. 239–240). The operators of equipment thus engaged were known in the industry as "owner-operators."

Appellees on July 1, 1935 and until February 1936 were engaged in supplying and operating such equipment under arrangements with "repu-

---

findings, and conclusions, but filed a single opinion covering both cases. In this court the records on the separate appeals from the two final decrees have been printed in a single volume.

[3] In both of these cases it was the appellee's predecessor in interest who was operating on July 1, 1935. The predecessor of the appellee in No. 52, N. E. Rosenblum Truck Lines, Inc., was Rosenblum, the individual (R. 203, 204), and the predecessor of appellee in No. 53, J. B. Margolies, was an individual, Baulos (R. 301).

For the purposes of these appeals, this change in interest is unimportant and, for convenience, these predecessor operations will be referred to as appellees' operations.

table" common carriers by motor vehicle operating between Chicago and St. Louis (Report, R. 6; R. 51). In each case only three tractor-trailer units were being so supplied and in each case principally to a single common carrier (Report, R. 6, 8). Prior to February 1, 1936 appellees hauled for no shippers, but exclusively for common carriers (R. 51, 75, 215).

The preponderant portion of the traffic of the common carrier with which appellees did most of their business was transported from consignor to consignee in its own vehicles (R. 98) but appellees' equipment was secured to handle overflow freight (R. 98). The freight so transported was in every instance solicited from the shipper by the common carrier (Report, R. 7; R. 99, 109) and the bills of lading were issued by the common carrier (R. 103, 109). The freight moved from consignor to consignee on the common carrier's way bills (R. 99, 108) and was delivered on the delivery receipts of the common carrier (R. 100, 108).

The freight so transported moved between the common carrier's terminals, that is between its dock in Chicago and its dock in St. Louis (R. 99, 100). Except in certain instances of full truck loads (R. 99), this freight was collected from the shippers in the common carrier's pick-up trucks, and accumulated at its dock. Employees of the common carrier loaded and unloaded the trucks and sealed the trailers (R. 67) and then the

freight was moved in appellees' equipment to the other terminals. There it was delivered to the consignee in the common carrier's delivery trucks (R. 100).

Arrangements for the movements were by oral contract (R. 52, 223). Appellees were paid a lump sum per trip on dock-to-dock movements (Report, R. 6, 8). This approximated sixty dollars a round trip or thirty dollars per trailer-load between Chicago and St. Louis (R. 223). Settlements were ordinarily made on a semi-monthly basis for one appellee and on a bi-monthly basis for the other (R. 69, 223).

In conducting the described operations, appellees protected their equipment by covering it with fire, theft and collision insurance in their own names (Report, R. 7, R. 67). Appellees operated the equipment, took care of it, bought the gasoline, the tires, the oil, kept it in repair, and hired the drivers (R. 53). The record does not disclose whether appellees' trucks bore the name of the common carrier when operated in its behalf and whether, or in whose name, the vehicles were registered with the state authorities (Report, R. 10). Cargo, public liability, property damage and like insurance for the protection of the general and shipping public were carried by the common carrier (Report, R. 7, R. 101). In some instances the cost of the latter types of insurance were charged to appellees and on occasion small cargo damage

claims were charged to them by the common carrier (Report, R. 7, R. 101–102).

The evidence leaves some doubt as to the exact amount of control exercised by the common carrier over appellees' drivers (R. 102–103). One common carrier testified that the "drivers are, under our direction" (R. 108). The common carrier directed the routes generally to be followed by the drivers, required them to "sign in" the registration stations along the route and directed the departure and time of arrival at destination (R. 102–103, 108).

Appellees' separate operations differed only in two particulars. The predecessor of the appellee in No. 53 submitted in evidence copies of written contracts between him and two shippers, providing for the transportation of various commodities (R. 213, 215). Although the contracts were in his name, freight moving thereunder was transported on the billing of the common carrier and the shippers paid the latter for the services rendered. The predecessor was paid on the trip basis in the same manner as previously described (R. 215, 223). The second particular in which the two operations differed was that the predecessor of the appellee in No. 53 was an office manager and dispatcher for the common carrier to whom he was supplying equipment on the "grandfather" date (R. 227). On the basis of this second circum-

stance the Commission found that appellee's predecessor had merely acted as the agent of his employer, the common carrier, when he took the contracts in his own name (R. 8).

After February 1936 appellees completely changed their methods of operation. They ceased hauling for common carriers and began hauling for individual shippers in their own right (R. 74, 219).

From the foregoing facts the Commission found that the applicants' equipment prior to February 1936 "was operated solely under the direction and control of the common carriers and under the latter's responsibility to the general public and to the shippers" (R. 10), and concluded that "as to such operations, applicants do not qualify as carriers by motor vehicle within the meaning of the Act and are consequently not entitled to a certificate or a permit under the 'grandfather' clause of Section 206 (a) or 209 (a) thereof" (R. 10). An order was entered jointly denying the applications (R. 204).

On October 8, 1940 appellees filed their separate petitions seeking to have the Commission's order set aside (R. 1, 28). The two cases were heard together by the court below on December 9, 1940 (R. 22, 39). The evidence consisted of the evidence before the Commission (R. 23). On January 14, 1941, the court filed a single opinion covering both cases (R. 15–19), and on the same day filed

separate but identical findings and conclusions (R. 20–22) (R. 36–38), and separate, but identical decrees, setting aside the Commission's order (R. 22–23, 39). It concluded in both cases that appellees were in "bona fide operation as a contract carrier in interstate commerce on July 1, 1935," and "in so operating assumed control, management and responsibility for the hauling of cargo" and that "there is no substantial evidence in the record to support the order entered" (R. 22, 38).

SPECIFICATION OF ERRORS TO BE URGED

The district court erred in both cases:

1. In weighing the evidence heard by the Commission and making independent findings of fact instead of limiting its consideration to the question of whether the Commission's order is supported by substantial evidence.

2. In failing to find that the facts stated in the Commission's report were supported by substantial evidence in the Commission record and that the findings of the Commission were sufficient in law to support its order.

3. In concluding, as stated in the second paragraph of the court's "Conclusions of Law," that "the plaintiff or its predecessor was in bona fide operation as a contract carrier in interstate commerce on July 1, 1935, over the routes for which application is made, and has so operated since that time; that plaintiff in so operating assumed con-

trol, management, and responsibility for the hauling of cargo."

4. In concluding, as stated in the third paragraph of the court's "Conclusions of Law," that "there is no substantial evidence in the record to support the order entered, and that the plaintiff is entitled to an order enjoining, suspending, and setting aside the order of the Interstate Commerce Commission."

5. In setting aside the Commission's order.

SUMMARY OF ARGUMENT

The grandfather clause of the Motor Carrier Act of 1935 was designed to permit the continuance of all common carrier operations in existence on June 1, 1935, and all contract carrier operations in existence on July 1, 1935. The plain intent of the statute is that a particular carrier operation shall only support a single operating authority based upon that operation. Frequently, in cases such as this, the Commission is compelled to determine which of several claimants was the actual carrier. In the instant case the Commission determined that the common carriers employing appellees' services and equipment were the "carriers" on the grandfather date and that, therefore, appellees could not claim grandfather rights for their operations at that time.

In any event, appellees could not be granted a permit because their claim for grandfather rights was based upon the assertion that they had performed under contract an integral part of the

common carrier operation. The statute and numerous decisions of the Commission plainly demonstrate that performance of a part of a common carrier operation is incompatible with contract carrier status.

In determining that appellees were not the carriers on the grandfather date, the Commission adopted a proper rule of determination, i. e., under whose direction and control and under whose responsibility to the general public and to the shipper were the operations conducted. Having determined that issue adversely to appellees upon the basis of substantial evidence, the Commission's determination should be sustained. The District Court, in reviewing the Commission's findings, not only misconstrued the statute but adopted an improper rule of judicial review, thus usurping the administrative function.

ARGUMENT

Section 209 (a) of the Act, provides that no person shall engage in the business of a "contract carrier by motor vehicle" in interstate commerce without a permit issued by the Commission authorizing such person to engage in such business. However, a "grandfather" proviso declares that if a carrier "was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935 . . . and has so operated since that time," the Commission shall issue such permit without requiring proof that the issuance of the permit

would be consistent with the public interest and with the policy declared in the Act.

Appellees based their claim to permits to operate as contract carriers on the contention that, since they were admittedly hauling freight on July 1, 1935, under agreements with common carriers, they came within the literal definition of a contract carrier on the effective "grandfather" date.[4] The Commission concluded upon the evidence that "applicants' equipment prior to February 1936 was operated solely under the direction and control of the common carriers and under the latter's responsibility to the general public and to the shippers and that as to such operations applicants do not qualify as carriers by motor vehicle within the meaning of the Act and are consequently not entitled to a certificate or a permit under the 'grandfather' clause of Section 206 (a) or 209 (a) thereof" (R. 10).

Although the Commission did not elaborate upon its reasoning, the rationale of the decision is apparent. The Commission has consistently held that the purpose and effect of the "grand-

---

[4] Section 203 (a) (15) of the Motor Carrier Act of 1935 provided:

> The term "contract carrier by motor vehicle" means any person, not included under paragraph (14) of this section, who or which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation.

father" clause was to permit the continuance of all motor carrier service which was in operation on July 1, 1935. Starting with the premise that as between appellees and the common carriers for which they hauled, operating authority could only be issued to the one actually furnishing the carrier service, the Commission determined the issue by deciding who actually controlled the operations here involved. Upon finding that appellees' operations were directed and controlled by the common carriers, the Commission was satisfied that those operations were part of the common carrier service (for which a "grandfather" certificate was properly issuable to the common carriers) and that no contract service had been rendered by appellees upon which authority to continue could be based.[5]

The court below overruled the Commission on its interpretation of the statute and its conclusion drawn from the evidence. The court explicitly held that the question whether contract carrier service was being offered by appellees to the shipping public on the "grandfather" date was immaterial; it was enough that appellees were hauling freight under contracts, even though the contracts were with common carriers (R. 17–19). In reviewing the evidence the court purported to apply the same rule of determination that was applied by the

[5] The Commission has held that no permit or certificate is required for the type of operation in which appellees were engaged on July 1, 1935 (see *infra*, p. 17).

Commission, i. e., whether appellees had direction and control of the operations claimed to support their applications. However, the court quite obviously attempted to weigh the evidence independently and in some instances apparently disregarded evidence upon which the Commission based findings. The court ruled that there was no substantial evidence to support the Commission's findings. We submit that the decision below disregards the purposes of the Act and the administrative construction of its provisions and that in reaching this decision the court below violated the fundamental principles of judicial review established by this Court.

I

THE CONSTRUCTION OF THE STATUTE ADOPTED BY THE COURT BELOW IS CONTRARY TO THE SETTLED ADMINISTRATIVE CONSTRUCTION AND IS NOT IN ACCORD WITH THE STATUTORY SCHEME

A. The Statute Does not Contemplate that Multiple Grandfather Rights Shall be Granted on the Basis of a Single Transportation Service

The issue raised by this case is only a slight variation of the problem which the Commission has faced in passing on numerous applications for permits under the grandfather clause. The factual situation presented by this case is not unusual in the industry and in many cases both the owner-operator and the person employing his equipment and services have sought operating authority

covering exactly the same service. If the Commission had adopted a policy of granting both applications the result would have been to create in each instance two or more businesses offering transportation services to the public where there had only been one on the "grandfather" date. This would have occurred despite the fact that the Commission had never determined, in accordance with sections 207 (a) or 209 (b) of the statute, the public necessity for the additional service or the consistency of the operation with the public interest and with the policy of the Act. However, the Commission has consistently held that where only one public service was being performed on the "grandfather" date, that service supplies a basis for only one authority to continue the operation.[6]

It seems apparent that the rule adopted by the Commission is in complete accord with the general scheme of the statute. Congress, by enacting the regulatory scheme, vested in the Commission the power to determine when and to what extent additional common carrier or contract carrier services might be offered to the public after July 1, 1935. In determining that question the Commission must find that the contract carrier service will be consistent with the public interest and that the common carrier service is required by the public convenience and necessity.[7] Obviously

[6] See cases cited in footnotes 11 and 12, *infra*, pp. 24, 25.

[7] Motor Carriers Act of 1935, Section 207 (a) and 209 (b).

Congress did not intend to permit additional common carrier or contract carrier services to be offered to the public by the simple device of allowing two or more persons to obtain separate permits under the "grandfather" clause on the basis of what had formerly been a single service to the public.

The court below, without questioning the fact that the common carriers who employed the appellees were entitled to common carrier "grandfather" rights on the entire line, held that appellees were entitled to contract carrier "grandfather" rights over the same route because they performed part of the transportation service for the common carriers under agreements with those carriers. Assuming, as we shall presently demonstrate, that appellees operated under the control of the common carriers, the service which appellees performed was an integral part of the common carrier service available to the public. Insofar as appellees were concerned, the public was compelled to use the common carrier service because appellees did not haul for anyone except common carriers (R. 51, 75, 215). It was not until after February 1936 that appellees began performing in their own name, under contract, transportation services for the shipping public. Thus a new and additional service was offered to the shipping public without the sanction of the Commission, although Congress had specifically required the

Commission's approval for the inauguration of all new transportation service by motor carrier.

The Commission quite properly refused to regard appellees' previous operations as contract carrier operations which could serve as a basis for the new operation because it found that previously the common carriers had furnished the entire transportation service to the public. The effect of the Commission's ruling was not to deprive appellees of the right to continue the same operations which they had conducted prior to the grandfather date. The Commission merely ruled that the prior operations were not "carrier" operations and hence were not subject to direct regulation under the Act. Accordingly, no authorization from the Commission was required for the continuance of those particular operations.[5]

---

[5] In *Dixon*, 21 M. C. C. 617, under similar circumstances, the Commission stated (p. 618):

> * * * applicant does not qualify as a carrier by motor vehicle within the meaning of the act. Accordingly, the *authorization sought is not required from us in order for him to continue his operation as in the past.* [Emphasis supplied.]

And, similarly in *Smythe*, 22 M. C. C. 726, the Commission said (p. 728), under similar circumstances:

> We conclude that applicant's vehicles are operated by the cartage company "by a lease or any other arrangement," within the meaning of section 203 (a) (15) of the act, *and that applicant* is not performing *any service for which authority is necessary* under the act. [Emphasis supplied.]

If the Commission had ruled that everyone in the same position as appellees was entitled to grandfather rights on the basis of the hauling done for common carriers, the result would have been complete chaos in the motor carrier industry. It has long been the practice in the industry for carriers to augment their own equipment by engaging extra trucks to handle overflow cargoes and in many instances the owner-drivers are also hired (R. 98, 103, 239–240). In one case recently decided by the Commission the evidence disclosed that on the grandfather date the applicant for a common carrier certificate was employing the services and equipment of eighty-three owner-operators and that some of the owner-operators had applied for operating authority covering the same service as that claimed by the applicant. *Kline*, 26 M. C. C. 741. A rule which would require the Commission to treat every owner-operator hauling for other carriers on July 1, 1935 as being a carrier within the meaning of the Act would result in such wholesale distribution of permits as to defeat the very purpose of federal regulation.

B. Appellees Cannot Claim To Be Contract Carriers Because Their Operations on July 1, 1935, Were Integral Parts of Common Carrier Systems

If we are correct in our contention that multiple "grandfather" rights may not be based on a single transportation service, appellees are entitled to

operating authority only if they show that they, and not the common carriers for whom they worked, actually rendered the common carrier service. The Commission held that appellees were not carriers at all and consequently were not rendering common carrier services. This determination of the Commission, as we show in Point II, *infra*, is correct and supported by the record.

Even if this Court should hold that multiple "grandfather" rights may be based on a single transportation service, however, appellees' position would not be aided. Appellees in effect admitted that they were not entitled to *common* carrier certificates but sought *contract* carrier permits on the basis of carriage performed for those entitled to the common carrier grandfather rights. We submit that, regardless of whether appellees might properly have claimed to be common carriers—the question discussed in Point II—the carriage of freight as a part of a common carrier operation is not contract carriage within the meaning of the statute.

In distinguishing between common carriers and contract carriers in the Act, it is not to be supposed that the Congress adopted arbitrary groupings superseding, for the purpose of regulation, all prior conceptions. At common law carriers fell into two classes, public and private. The difference between the two lay in the fact that in the case of public carriage there was an obligation to serve the general public indiscriminately

within the limits of the carrier's capacity and his undertaking. All carriers not assuming that obligation were classed as private carriers. With the advent of motor transportation, there developed a class of carriers by motor vehicle who did not serve the public indiscriminately, but who limited their services to certain shippers with whom they had contracts. Although these carriers were a species of private carrier under the common law conception, they were nevertheless carriers for hire and as such were held subject to regulation. *Stephenson* v. *Binford*, 287 U. S. 251. It was to these carriers who, like common carriers, furnish an entire service from consignor to consignee that the term "contract carrier", as used in the Act, was intended to apply.

The provisions of the Act applicable to contract carriers quite obviously were not designed to regulate owner-driver operations conducted for other carriers. Nothing in the entire regulatory scheme indicates any reason for requiring that such operations should be permitted only after a showing that the operations are "consistent with the public interest" and with the declared purpose of the Act (Section 209 (b)); or that such operators should file schedules of their minimum rates (Section 218 (a)); or that the Commission should prescribe the minimum rates (Section 218 (b)). Furthermore, the Act plainly envisages that contract carriers and common carriers will offer com-

peting types of service. Section 218 (b) of the Act enjoins the Commission, in prescribing minimum charges for contract carriers, "to give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle subject to this part." There are frequent references in the sections dealing with contract carriers to the policy declared in Section 202 (a) which, among other things, lays stress upon the avoidance of unfair or destructive competitive practices.[9] Certainly these provisions indicate that Congress did not intend that persons performing a part of a common carrier service should be regulated as contract carriers even though the arrangement with the carrier was in the nature of a contract for the transportation of freight.

---

[9] In this connection the Commission has said (*Scott Bros., Inc.*, 4 M. C. C. 551, 559):

> When truck operators contract to do work in connection with transportation for carriers, of whatever description, which serve shippers directly, there may be unfair and destructive competition with motor common carriers, but it is not the truck operator who carries it on. Rather it is the carrier for which he works, and it is that carrier which must be held responsible and is subject to regulation in that respect. The truck operator has no direct dealings with the shipping public, nor does he fix the rates or charges with which the motor common carrier must compete. It is true that the truck operator may contract to do his work for unduly low compensation, to the advantage of the carrier in competition, but all carriers have an equal opportunity to employ such operators, just as they have an equal op-

The Commission has consistently refused, under varying circumstances, to accord contract carrier status to an operation which, as a part of a total common carrier service, is *public* rather than *private* in character. Thus, in *Scott Bros., Inc.*, 2 M. C. C. 155; 4 M. C. C. 551, it held that collection and delivery service by a motor carrier under individual contracts with two railroad companies within the New York terminal district, being "part and parcel of the common-carrier service of the railroads," was not contract carrier service.[10] Also in *Dick's Transfer & Truck Term.*, 20 M. C. C. 785, the Commission held for the same reason that a motor carrier performing collection and delivery service within the City of Pittsburgh under contract with line-haul motor common carriers was not a contract carrier. We believe it clear that this administrative construction accords with both the language and purpose of the Act and that the court below erred in holding to the contrary.

---

portunity to hire labor or buy fuel. There may be need, on considerations of social welfare, to protect the truck operators or the employees or the fuel dealers against destructive competition with each other, but it is clear that the regulation of contract carriers in part II was not designed for such a purpose, but for the protection of the common carriers.

[10] The Commission said (p. 564):

> Nor would applicant, under the proposed arrangement, be a "contract carrier by motor vehicle," because the transportation in which it proposes to engage must be judged by the entire service from consignor to consignee, and is distinctively a common-carrier service. It would perform work in connection with the latter service and, to that extent, would join or share in it.

II

THE COMMISSION'S DETERMINATION THAT APPELLEES WERE NOT CARRIERS IS CORRECT AND SUPPORTED BY SUBSTANTIAL EVIDENCE

From the foregoing discussion it is apparent that appellees have based their application on facts which refute their contention that they were operating as contract carriers on the grandfather date. However, the Commission chose to place its decision on the broader ground that the appellees were not carriers under the Act at all. This determination of the Commission was, we submit, correct and supported by the evidence.

In deciding that appellees did not have a carrier status, the Commission followed its consistent rule that an applicant is not a carrier if he does not have direction and control of the operations relied upon in support of his claim to operating authority. In its leading decision on this point, *Dixie Ohio Exp. Co.*, 17 M. C. C. 735, the Commission said (at page 740):

> If the vehicles of the owner-operators, while being used by applicant, were operated under its direction and control, and under its responsibility to the general public as well as to the shipper, then its operations, in which such vehicles were employed, come within the phrase "or by a lease or any other arrangement" of section 203 (a) (14), and applicant, as to such op-

erations, was a common carrier by motor vehicle. The traffic transported in the vehicles of the owner-operators moved under bills of lading issued by applicant. The vehicles, while in applicant's service, were registered under applicant's operating authority and had applicant's name painted, or otherwise shown, thereon. Insurance covering them was arranged and paid for by applicant. Applicant's dispatchers or other employees directed the time and manner of the loading and unloading of the vehicles and also directed their movement over applicant's routes. We conclude that they were operated under applicant's direction and control and under its responsibility to the general public as well as to the shipper, and that applicant, as to its operations in which such vehicles were employed, was a common carrier by motor vehicle as defined in section 203 (a) (14).

This rule of determination has been uniformly followed by the Commission in the many cases involving this issue,[11] and has received the ap-

[11] *Tips*, 18 M. C. C. 85; *Columbia Terms. Co.*, 18 M. C. C. 662; *B-Line Motor Freight*, 20 M. C. C. 538; *Riss & Co., Inc.*, 21 M. C. C. 521; *Kaplan Trucking Co.*, 21 M. C. C. 691; *Sunset Motor Lines, Inc.*, 22 M. C. C. 113; *Galveston Truck Line Corp.*, 22 M. C. C. 451; *M. Moran Transp. Lines, Inc.*, 23 M. C. C. 139; *Welsh*, 23 M. C. C. 404; *J. Miller Co.*, 23 M. C. C. 421; *Highway Motor Freight Lines, Inc.*, 23 M. C. C. 621; *Day*, 23 M. C. C. 715; *Brady Transfer & Storage Co.*, 23 M. C. C. 767; *N. E. Rosenblum Truck Lines, Inc.*, 24 M. C. C. 121; *Schiller*, 24 M. C. C. 127; *Los Angeles-Seattle*

proval, both in principle and in application, of four specially constituted three-judge courts before whom the Commission's orders have been challenged.[12] Moreover, the intervening Transportation Act of 1940 left unchanged the Commission's construction of the Act, and lends great weight to the administrative rule. *United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 539. Since neither the argument of appellees nor the decision of the court below appears to challenge the validity of the rule in its general application, it would seem that the only remaining question is whether the Commission properly applied the rule to the facts of this case.

The principle is well settled that "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 146; *Mississippi*

M. Exp., Inc., 24 M. C. C. 141; *Mobile Exp., Inc.*, 24 M. C. C. 254; *Campbell*, 24 M. C. C. 281; *Inland Motor Freight, Inc.*, 24 M. C. C. 293; *Hoffman*, 24 M. C. C. 376; *Nixon*, 26 M. C. C. 325; *Eakin*, 26 M. C. C. 339; *Davis*, 26 M. C. C. 349; *Brown*, 26 M. C. C. 399; *Shea*, 26 M. C. C. 419; *O. L. D. Forwarding Corp.*, 26 M. C. C. 481; *Puzio*, 26 M. C. C. 555; *Hoerman*, 26 M. C. C. 706; *Schrieber*, 26 M. C. C. 723; *Columbus & Chicago Motor Freight Inc.*, 26 M. C. C. 768.

[12] *O'Malley* v. *United States*, (D. Minn.) 38 F. Supp. 1; *Hoerman* v. *United States*, W. D. Mo., June 10, 1941; *Lubetich* v. *United States*, W. D. Wash., June 10, 1941, now on appeal to this Court, No. 322; *Johnson* v. *United States*, D. Ore., Sept. 1941.

Valley Barge Line Co. v. *United States*, 292 U. S. 282, 286–287; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303. Even a cursory examination of the record suffices to demonstrate that the Commission's findings on the question of control not only had a rational basis but were supported by substantial evidence.

The record shows that the common carriers assumed the responsibility to the general public and to the shipper for the complete transportation service. The common carriers solicited the freight (R. 99, 109) and issued the bills of lading (R. 103, 109), and the freight moved from consignor to consignee on the common carriers' way bills and delivery receipts (R. 99, 108). In most cases, the common carriers collected the freight in their own pick-up trucks (R. 99). Their employees accumulated the freight at their docks, and loaded and sealed the trailers (R. 67). The freight then moved in appellees' equipment to the common carriers' destination terminal. There it was unloaded by the common carriers' employees (R. 67) and delivered to the consignees in their delivery trucks (R. 100). The common carriers carried the cargo, public liability, property damage and like insurance for the protection of the general and shipping public (Report, R. 7, R. 101). Upon these facts, the Commission could reasonably conclude that appellees were not the "carriers" performing the transportation service between the terminals.

No useful purpose would be served by reviewing in detail the evidentiary facts recited by the court below in its opinion (R. 15–19) and its findings of fact (R. 20–21). Apparently the court searched the record, not for the purpose of determining whether there was evidence to support the Commission's findings, but to see what other evidence was available.

While there is no great difference between the Commission and the court on the evidentiary facts, in some instances the findings of the court contradict the Commission's recital of the facts. Since there was evidence to support the Commission's evidentiary findings, the conflicting findings made by the court could have resulted only from an attempt to weigh the evidence and pass on the credibility of witnesses. In doing so the court plainly usurped the administrative function and exceeded the bounds of proper judicial review. *Warehouse Co.* v. *United States*, 283 U. S. 501, 508.

With equal disregard for the conclusions of the administrative body charged with duty of making such determinations, the court below rejected the Commission's ultimate findings on the questions of control and the carrier or non-carrier status of appellees. We believe that this disregard resulted as much from the court's misconception of the applicable law as from its failure to abide by the fundamental rules of judicial review. There would seem to be no question as to the sufficiency

of the evidence or the soundness of the Commission's ruling under a proper construction of the statute.

CONCLUSION

It is respectfully submitted that the decrees of the lower court should be reversed.

CHARLES FAHY
Acting Solicitor General

THURMAN ARNOLD
Assistant Attorney General

JAMES C. WILSON
FRANK COLEMAN
Special Assistants to the Attorney General

IRVIN L. STEPHENSON
Special Attorney

DANIEL KNOWLTON
Chief Counsel, Interstate Commerce Commission

NELSON THOMAS
Attorney, Interstate Commerce Commission

OCTOBER 1941

APPENDIX

This Appendix contains the pertinent text of the principal sections of the Motor Carrier Act, 1935, cited in the body of the brief.

Some of these sections were amended by the Transportation Act of 1940, 54 Stat. 899, approved September 18, 1940, but they are set forth in this Appendix as they existed when the order of the Commission was entered. A footnote to each section subsequently amended shows the character of the amendment, if any.

Motor Carrier Act, 1935:

> SEC. 203 (a) (15) The term "contract carrier by motor vehicle" means any person, not included under paragraph (14) of this section, who or which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation.[1]

---

[1] The Transportation Act of 1940 amended this definition. Both the original and the revised definitions are indicated in the following, wherein words which have been eliminated by the amendment are indicated by canceled type and those which have been added are indicated by italics:

The term "contract carrier by motor vehicle" means any person ~~not included under paragraph (14) of this section, who or~~ which, under ~~special and~~ individual contracts or agreements, ~~and whether directly or by a lease or any other arrangement, transports~~ *engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of* passengers or property in interstate or foreign commerce ~~by motor vehicle~~ for compensation.

SEC. 203 (a) (14) The term "common carrier by motor vehicle" means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I.[2]

---

[2] The Transportation Act of 1940 amended this definition. Both the original and the revised definitions are indicated in the following, wherein words which have been eliminated by the amendment are indicated by canceled type and those which have been added are indicated by italics:

The term "common carrier by motor vehicle" means any person ~~who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of Part I~~ *which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.*

SEC. 203 (a) (17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.[3]

SEC. 203 (a) (19) The "services" and "transportation" to which this part applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier or carriers and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith.[4]

SEC. 209 (a) No person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided,* That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor

[3] This provision was not amended by the Transportation Act of 1940.

[4] This provision was not amended by the Transportation Act of 1940.

vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. * * *[5]

[5] This provision was not amended by the Transportation Act of 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1941